Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT
Of The
UNITED STATES

OCTOBER TERM, 1997

STATE OF TEXAS, ET AL.
Petitioners
v.
FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC Resolution Fund as Receiver of First South, N.A., Defendant
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Whether 12 United States Code §1825(b)(3) or the doctrine of sovereign immunity exempts the Federal Deposit Insurance Company from liability for either ad valorem taxes assessed and levied pursuant to Texas Tax Code Section §23.55 or the interest on such taxes as provided for in Texas Tax Code §33.01.

2. Whether 12 United States Code §1825(b)(3) or the doctrine of sovereign immunity exempts the Federal Deposit Insurance Company from the administrative requirements of Chapters 41 and 42 of the Texas Tax Code.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed as follows and as they appeared in the style of the case:

Plaintiffs in the Trial Court (Petitioners)

1. STATE OF TEXAS, COUNTY OF TARRANT, TARRANT COUNTY RIGHT OF WAY DISTRICT, TARRANT COUNTY HOSPITAL DISTRICT, and TARRANT COUNTY JUNIOR COLLEGE DISTRICT:
2. CITY OF WATAUGA:
3. KELLER INDEPENDENT SCHOOL DISTRICT:

Defendants in the Trial Court (Respondents)

FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC Resolution Fund as Receiver of First South, N.A.:

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TO THE HONOURABLE SUPREME COURT:

Petitioners, STATE OF TEXAS, COUNTY OF TARRANT, TARRANT COUNTY RIGHT OF WAY DISTRICT, TARRANT COUNTY HOSPITAL DISTRICT, TARRANT COUNTY JUNIOR COLLEGE DISTRICT, CITY OF WATAUGA, and KELLER INDEPENDENT SCHOOL DISTRICT, respectfully request that a writ of certiorari issue to review the order of the Texas Supreme Court which let stand a final judgment of the Tarrant County District Court.

OPINIONS BELOW

The Order of the Texas Supreme Court refusing the Petitioner's Writ of Error is unreported. The Opinion of the Texas Court of Appeals is also unreported.

STATEMENT OF JURISDICTION

The Texas Supreme Court refused Petitioners application for Writ of Error on June 8, 1998. (App. 1-2) The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The Federal Deposit Insurance Corporation (FDIC) as manager of the FSLIC Resolution Fund, as Receiver for First South, N.A. took possession of three pieces of real property in February 1990. In 1992, the Tarrant County Appraisal District determined that there was a change of use of the property, which up to that time had received agricultural-use

appraisal instead of market value appraisal, pursuant to Texas Tax Code § 23.51 et. seq., and roll-back taxes were assessed by the Petitioners for the years in question. Those years are 1987, 1988, 1989, 1990, 1991. Said taxes remaining unpaid and delinquent, Tarrant County filed two delinquent tax suits to collect said taxes from the FDIC. Keller Independent School District and the City of Watauga subsequently filed interventions in both suits. Upon service of citation, FDIC filed its Original Answers in both causes in December of 1993, pleading General Denial and affirmative protection from foreclosure and delinquent penalties and interest under 12 U.S.C. §1825(b)(3). Both cases were called for Trial on June 29th , 1995 and, after hearing evidence, the Court held in favor of the Petitioners. The FDIC's counsel appeared after the Trial had concluded and requested a delay in signing the Judgment until the FDIC could file an Amended Trial Brief. Said Trial Brief was filed October 13, 1995 and the Judgment in favor of the Petitioners was signed November 21, 1995. Motion for New Trial was filed by the FDIC December 19, 1995 and was granted January 20, 1996. FDIC subsequently filed a Motion for Summary Judgment, which was granted by order of the Court signed April 9, 1997. Said Summary Judgment (App. 6-7) was predicated on the FDIC's and the Court's interpretation of 12 U.S.C. §1825(b)(3) after full briefing with the FDIC's Motion for Summary Judgment and the Response of Petitioners . The Court of Appeals affirmed the decision of the Trial Court on January 22, 1988 by unpublished opinion (App. 3-5). The Texas Supreme Court refused Petitioners' Petition for Writ of Error on June 5, 1998. (App. 1-2)

REASONS FOR GRANTING THE WRIT

12 United States Code §1825(b)(1) directs the FDIC to pay all taxes assessed on the basis of market value on

property which it owns. § 23.55, TEXAS TAX CODE ANN. mandates the recovery and assessment of an ad valorem tax based on market value on property which, having received the benefit of productivity value taxation under TEX. CONST. Article VIII, Section 1-d-1, is changed from an agricultural use to a non-agricultural use. The Texas Courts of Appeal and, by extension, the Texas Supreme Court have misconstrued 12 United States Code §1825(b) by stating that the immunity to penalties granted in 12 United States Code §1825(b)(3) shields the FDIC from the mandate of 12 United States Code §1825(b)(1). Even if this market value assessment is held to be a penalty, it is a penalty from which the FDIC is not immune. Allowing this overbroad interpretation of 12 United States Code §1825(b)(3) to stand would operate to the severe detriment of all local governments which rely on ad valorem assessments.

I. The Texas Appellate Courts erred in determining that the FDIC was not liable for taxes assessed and levied pursuant to Tax Code Section 23.55 and the interest accrued thereon due to the provisions of 12 United States Code §1825(b)(3) and the doctrine of sovereign immunity..

12 U.S.C. §1825(b)(1), (2) and (3) read as follows:

> **(1)... any real property of the [FDIC] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed...**
>
> **(2) No real property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of**

the [FDIC], nor shall any involuntary lien attach to the property of the [FDIC].

(3) The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

§ 1825(b)(1) states quite clearly that the property is subject to ad valorem taxation in accordance with its value. This property was subjected to such a tax. § 23.55, TEXAS TAX CODE (App. 11-13) imposes an additional tax on property, formerly granted special-use valuation, equal to the tax on market value less the tax paid on the special use value. This tax is imposed plus interest for the five years preceding the change of use.

The FDIC has argued to the Court that the "rollback" tax is in fact a penalty which is not due under 12 USC §1825(b)(3) and the doctrine of sovereign immunity. They base this claim on three things: the use of the word sanction in §23.55(f) and Article VIII, § 1-d-1 (App. 10); the meaning of the word sanction in Black's law dictionary; and the use of the word penalty in the now-defunct State Property Tax Board Manual for the Appraisal of Agricultural Land. This argument does not find any support in case law or in the statutes themselves.

The rollback assessment triggered by change of use is consistently referred to by legal authorities as "an additional tax". ***See*** § 23.55(a), TEXAS TAX CODE (App. 11); Siracuse v. Nueces County, 890 SW2d 884 (Corpus Christi - 1994), no writ; Tex. Atty. Gen. Op. LO 95-054; Tex. Atty. Gen. Op. JM-949, September 1, 1988 (also calls rollback a recapture of taxes); Tex. Atty. Gen. Op. DM-220, April 27, 1993.

The fact that the tax is also called a sanction does not affect the liability for the tax, since all taxes are in fact sanctions. In Ex Parte Ariza, 1995 WL 653105, 913 SW2d 215 (Austin - 1995), the Austin Court of Appeals quoted from the U.S. Supreme Court in Montana Department of Revenue v. Kurth Ranch, 128 L.Ed.2d 767 (1994) as follows:

> Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these ***sanctions*** are subject to constitutional analysis. (emphasis added)

In Ariza and in Kurth Ranch, the Courts looked at the legislative intent behind the sanction. The legislative documents studying Article VIII, 1-d-1 and §23.55 clearly show the Legislature's belief that the rollback was a tax imposed on value. In its Property Tax Study Committee Report, the Texas Legislative Council states that "An owner taking qualified land out of agricultural use should pay **additional taxes** on the difference between productivity value and market value"... Texas Legislative Council, Report No. 65-2, January 1979 (authored by Rep. Wayne Peveto, one of the authors of the State Property Tax Code), p.4. In an analysis of the rollback provision's effect on Property Tax Code, the House Study Group repeatedly refers to the rollback tax as a **"deferred tax"**. House Study Group Special Report, Number 61, November 10, 1980, pp.78,79. Lastly, in a study of implementation of HJR 1 (what became Article VIII, § 1-d-1), the House Study Group refers to the rollback tax as a collection of **"lost" revenue**. House Study Group Special Legislative Report, No. 40, November 15, 1978, p 9.

Even if § 23.55, TEXAS TAX CODE imposes a "penalty", it is a penalty which must be paid by the FDIC – a penalty which incidentally is assessed on every property owner who changes the use of property "to the same extent according to its value as other real property is taxed" (quoting from 12 USC §1825(b)(1). 12 U.S.C. §1825(b)(1) is a clear waiver of sovereign immunity as to taxes based on value, whether they are punitive in nature or not. The FDIC has argued that §1825(b)(3) provides a blanket immunity from any and all assessments which are or might be punitive in nature. This is not a valid reading of §1825(b)(3).

It is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In Interest of S.H.A., 728 SW2d 73 (Ct. App. - Dallas 1987), **writ ref'd n.r.e.** A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void, or insignificant. U.S. v. Menasche, 348 US 528 (1955). If the Congress had intended the reading promoted by the FDIC, the statute could have ended with the phrase "penalties or fines". Congress could have left §1825(b)(3) out completely, as they did for the RTC, in which case we would be talking only about sovereign immunity. However, they did not do any of these things - they chose to follow the general terms "penalties or fines" with specific terms. If the general terms "penalties or fines" are given their full and natural reading, they would include the late fees or penalties listed after "including" in §1825(b)(3).

Under the statutory construction doctrine of **ejusdem generis**, whenever a general term, such as "penalty" is followed by a listing of specific nature, and those specific terms can be said to belong to a class of items, the general term is defined by the class of the specific terms. ***See*** Brown & Root v. Donovan, 747 F2d 1029 (5th Circuit - 1984) and ***generally*** SUTHERLAND STAT CONST § 47.17 et. seq. (5th Ed.) This rule is especially applicable to statutes of a punitive

nature. ***See*** First National Bank v. U.S., 206 F. 374, 379 (1913). The specific terms in §1825(b)(3) which follow the word "including" are monetary exactions assessed for late action. Given the fact that the FDIC acts as receiver for those institutions which are less than rigorous in their duties, exempting the FDIC from late penalties has some justification. However, that reading does not and should not protect the FDIC from the consequences of their own intentional acts. The FDIC knew that they owned this property and chose to either change the use or allow the use to be changed. This was the determination of the Appraisal District and that determination was not contested by the FDIC. All other taxpayers who change the use of "ag-use" property are required to pay the additional tax - the FDIC should not be exempted from this requirement.

The doctrine of ejusdem generis also distinguishes in degree as to the specific terms. "The general term is construed to embrace only those objects said by the court to be of equal or inferior rank to those enumerated", quoting from SUTHERLAND, ***id.***, at § 47.19. Delinquent penalties are understood in Texas law to be inferior to an actual tax levy. Tax levies, once assessed, cannot be waived without specific authorization from the state Constitution. ***See*** Art. III, Sec. 55, TEX. CONST. and Jones v. Williams, 45 SW2d 130 (Tex. 1931). Penalties, however, are subject to waiver by the Legislature and by individual Petitioners. ***See*** Jones, id. and § 33.011, TEXAS TAX CODE. Allowing one taxpayer to avoid payment of a tax levy would violate the Constitutional requirement of equality and uniformity. ***See*** Art. VIII, Sec. 1, TEX. CONST. (App. 8-9)

As to the interest assessed as per § 33.01, TEXAS TAX CODE (App. 14) on the property taxes imposed, the FDIC has characterized the interest as a penalty. This is not the law. Under case law interpreting § 33.01 and its predecessors prior to 1991, it is true that such interest was once considered a penalty. However, § 33.01(c), was

amended in 1991, to specifically make interest an economic reimbursement similar to post-judgment interest Such interest is no longer a penalty under Texas law and is not affected by § 1825(b)(3) and the doctrine of sovereign immunity.

II. The Texas Appellate Courts erred in allowing the FDIC to contest the levy and assessment of the ad valorem tax since the FDIC had failed to exhaust administrative remedies.

Whenever the Appraisal District makes a determination that a change of use has occurred on property appraised at special-use value and that "rollback taxes" are to be levied, the Chief Appraiser is required to send a Notice of that determination to the taxpayer. ***See*** § 23.55(e), TEXAS TAX CODE. That determination is subject to administrative review, if protested, by the Appraisal Review Board. ***See generally*** Chapter 41.41 (App.15) et seq. , TEXAS TAX CODE. If the taxpayer disagrees with the decision of the Appraisal Review Board, the taxpayer can appeal to District Court. ***See*** § 42.01, TEXAS TAX CODE. This procedure was followed by the Resolution Trust Corporation in the RTC case. RTC, ***id.*** Failure to follow these procedures results in a waiver of any defense based on the matters which could have been protested and those matter may not be raised in a delinquent tax suit. ***See*** § 42.09, TEXAS TAX CODE (App. 16.

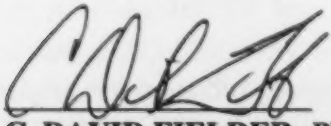
The FDIC has stated that they are exempted from the requirement that they exhaust their administrative remedies. As support for this, they cite FDIC v. Lowery, 12 F3rd 995 (10th Cir. 1993). That case is not on point. In Lowery, the Court held that where the prior owner did not pursue his administrative remedies, §1825(b)(1) allows the FDIC to

pursue value issues without regard to the prior owner's inaction. This is a sound reading of §1825(b)(1) and has no application here. The FDIC owned the property when the change of use occurred, they received notice of the determination of change of use, and they failed to protest the imposition of the rollback tax (a failure which did not occur in the RTC case). Again, the FDIC is attempting to insulate itself from the adverse consequences of its own inaction. Accordingly, we ask that they not be allowed to contest this in a delinquent tax suit. **See** § 42.09, TEXAS TAX CODE. The FDIC has also claimed that the Appraisal District and the Appraisal Review Board is incapable of making decisions based on legal interpretation. This application of the law to the facts is in fact well within the purview of those entities. ***See*** §§ 11.01 and 11.12, TEXAS TAX CODE (dealing with public property and federal exemptions) and § 11.45, TEXAS TAX CODE.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,



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THE SUPREME COURT OF TEXAS

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RE: **Case Number 98-0194**
Court of Appeals Number: 02-97-00160-CV
Trial Court Number: 236-E08949-93

Style:

STATE OF TEXAS, COUNTY OF TARRANT, TARRANT COUNTY RIGHT OF WAY DISTRICT, TARRANT COUNTY HOSPITAL DISTRICT, and TARRANT COUNTY JUNIOR COLLEGE DISTRICT, plaintiffs; CITY OF WATAUGA, intervening plaintiff; KELLER INDEPENDENT SCHOOL DISTRICT, intervening plaintiff

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as MANAGER OF THE FSLIC RESOLUTION FUND as receiver of FIRST SOUTH, N.A.

Dear Counsel:

Today, the Supreme Court of Texas denied the (3) three petitions for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/
Bianca E. Morin, Deputy

cc: Ms. Stephanie Lavake, Clerk
Mr. Thomas A. Wilder, Clerk

COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-160-CV

STATE OF TEXAS, COUNTY OF TARRANT, TARRANT COUNTY RIGHT OF WAY DISTRICT, TARRANT COUNTY HOSPITAL DISTRICT and TARRANT COUNTY JUNIOR COLLEGE DISTRICT; and CITY OF WATAUGA and KELLER INDEPENDENT SCHOOL DISTRICT, as Intervenors
APPELLANTS

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION as Manager of the FSLIC RESOLUTION FUND as Receiver for FIRST SOUTH, N.A.
APPELLEE

FROM THE 236th DISTRICT COURT OF TARRANT COUNTY

MEMORANDUM OPINION

This is an appeal from the granting of summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC") in which the trial court determined that the FDIC was not liable for "rollback taxes" and interest accrued on real property owned by the FDIC under sections 23.55 and 33.01, respectively, of the Texas Tax Code. See

TEX. TAX CODE ANN. § § 23.55, 33.01 (Vernon 1992 & Supp. 1998). We will affirm.

The FDIC is immune from liability for "rollback taxes" under the doctrine of sovereign immunity because the taxes are penalties and there is no express congressional waiver of immunity for such a penalty. See Resolution Trust Corp. v. Tarrant County Appraisal Dist., 926 S.W.2d 797, 805 (Tex. App.--Fort Worth 1996, no writ); see also 12 U.S.C.S. § 1825(b)(2), (3) (Law. Co-op. 1996). Moreover, 12 U.S.C.S. § 1825(b)(3) expressly shields the FDIC from liability for any amounts in the nature of penalties or fines, including those arising from the failure to pay any real property taxes when due. See 12 U.S.C.S. § 1825(b)(3). This immunity would logically extend to interest on such penalties. Thus, we hold that the FDIC is immune from liability for the taxes and interest assessed in this case. Points one and two are overruled.

The appellants contend that the FDIC is precluded from challenging the assessment of the rollback taxes on sovereign immunity grounds, because it did not raise the immunity defense in an appeal of the Appraisal Review Board's ("ARB") determination to the trial court and, thus, failed to exhaust its administrative remedies- The record reflects that the FDIC raised its immunity defense for the first time as a defense to the action brought by appellants in the district court for collection of the taxes. We hold that the FDIC's failure to assert sovereign immunity in an appeal from the ARB's ruling did not preclude it from raising the defense in the trial court, because immunity may be asserted at any time. See Resolution Trust Corp., 926 S.W.2d at 802. Point three is overruled.

The summary judgment is affirmed.

/s/
JOHN CAYCE
CHIEF JUSTICE

PANEL A:

CAYCE, C.J.; DAUPHINOT and BRIGHAM, JJ.

DO NOT PUBLISH
TEX. R. APP. P. 47.3(a)

JAN 22, 1988

CAUSE NO. E08949-93

STATE OF TEXAS, COUNTY OF TARRANT, ET. AL.	§ IN THE § § DISTRICT § COURT
vs.	§ OF TARRANT §
F.D.I.C., AS MANAGER OF THE FSLIC RESOLUTION FUND, AS RECEIVER FOR FIRST SOUTH SAVINGS, F.A.	§ COUNTY, § TEXAS §236TH JUDICIAL § DISTRICT

AGREED ORDER GRANTING DEFENDANT FDIC's MOTION FOR SUMMARY JUDGMENT

On the 27th day March, 1997, the Court considered the Defendant FDIC's Motion for Summary Judgment. After considering the Motion, subsequent Response by the City of Watauga, written adoption of the City of Watauga's Response by Keller ISD and Tarrant County, and the FDIC's Reply to City of Watauga's Response, the Court finds that it should grant the relief requested in Defendant FDIC's Motion for Summary Judgment.

THEREFORE, THE COURT GRANTS the FDIC's Motion for Summary Judgment and ORDERS that the Plaintiff Tarrant County and Intervenors Keller ISD and City of Watauga to this litigation take nothing and each party shall bear its own costs and attorneys' fees.

IT IS FURTHER ORDERED, pursuant to a certain Escrow Agreement (the "Agreement") dated March I1, 1996, entered into between the Federal Deposit Insurance Corporation, as Manager of FSLIC Resolution Fund, as Receiver for First South, F.A. (the "FDIC"), Tarrant County, Keller ISD, City of Watauga, Watauga Parks Development Corporation (collectively the "Parties"), and Safeco Land

Title of Tarrant (the "Escrow Agent"), the sum of $548,242.24 (the "Escrowed Funds") was placed in escrow for the purpose of providing a source of payment for the portion of the taxes, together with any interest thereon, purported to be secured by tax liens held by Tarrant County and Keller ISD, if such taxes were later determined to be payable by the FDIC. This Court has determined that such rollback taxes are a penalty and that the FDIC is not liable for the payment of such taxes, or any interest thereon. pursuant to the provisions of 12 U.S.C.A. § 1825(b)(3) (West 1989).

IT IS FURTHER ORDERED, that this Order Granting Defendant FDIC's Motion for Summary Judgment shall, upon the conclusion of any and all appeals thereof or the expiration of all applicable appeal periods, be considered the final judgment in this tax suit and shall serve as notice to the Escrow Agent that no taxes against the Property, or any interest thereon, are payable by the FDIC to Tarrant County or Keller ISD, as a result of this final judgment. Upon receipt of a certified copy of said final judgment, the Escrowed Funds, together with all accrued interest on that amount, shall be promptly returned to the FDIC by the Escrow Agent and the Escrow Agent shall record the Releases (as defined in the Agreement) in the appropriate records of Tarrant County, Texas, and thereafter the Parties shall have no further rights or obligations under the Agreement.

IT IS FURTHER ORDERED, that the Tarrant County Tax Office shall delete all taxes assessed to the FDIC for rollback taxes on Account Numbers 5684382, 5684390, and 3863964 for the 1987 through 1991 tax years inclusive, as having been erroneously assessed.

SIGNED this 9 day of April, 1997

/s/

Tom Lowe
PRESIDING JUDGE

The Texas Constitution

Article 8 - TAXATION AND REVENUE

Section 1 - EQUALITY AND UNIFORMITY; TAX IN PROPORTION TO VALUE;TAXATION OF TANGIBLE AND INTANGIBLE PROPERTY; OCCUPATION TAXES; INCOME TAX; EXEMPTION OF HOUSEHOLD GOODS

(a) Taxation shall be equal and uniform. (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than Municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. (c) The Legislature may provide for the taxation of intangible property and may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. Subject to the restrictions of Section 24 of this article, it may also tax incomes of both natural persons and corporations other than municipal. Persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax. (d) The Legislature by general law shall exempt from ad valorem taxation household goods not held or used for the production of income and personal effects not held or used for the production of income. The Legislature by general law may exempt from ad valorem taxation: (1) all or part of the personal property homestead of a family or single adult, "personal property homestead" meaning that personal property exempt by law from forced sale for debt; and (2) subject to Subsections (e) and (g) of this section, all other tangible personal property, except structures which are personal property and are used or occupied as residential dwellings and except property held or used for the

production of income. (e) The governing body of a political subdivision, other than a county education district, may provide for the taxation of all property exempt under a law adopted under Subdivision (2) of Subsection (d) of this section and not exempt from ad valorem taxation by any other law. In the manner provided by law, the voters of a county education district at an election held for that purpose may provide for the taxation of all property exempt under a law adopted under Subdivision (2) of Subsection (d) of this section and not exempt from ad valorem taxation by any other law. (f) The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business. (g) The Legislature may exempt from ad valorem taxation tangible personal property that is held or used for the production of income and has a taxable value of less than the minimum amount sufficient to recover the costs of the administration of the taxes on the property, as determined by or under the general law granting the exemption. (h) The Legislature
may exempt from ad valorem taxation a mineral interest that has a taxable value of less than the minimum amount sufficient to recover the costs of the administration of the taxes on the
interest, as determined by or under the general law granting the
exemption. (Amended Nov. 7, 1978, and Nov. 3, 1987; Subsecs. (b) and (f) amended Nov. 7, 1989; Subsec. (e) amended Aug. 10, 1991; Subsec. (c) amended Nov. 2, 1993; Subsec. (d) amended and (g) and (h) added Nov. 7, 1995.)

The Texas Constitution

Article 8 - TAXATION AND REVENUE

Section 1-d-1 - TAXATION OF CERTAIN OPEN-SPACE LAND

(a) To promote the preservation of open-space land, the legislature shall provide by general law for taxation of open-space land devoted to farm, ranch, or wildlife management purposes on the basis of its productive capacity and may provide by general law for taxation of open-space land devoted to timber production on the basis of its productive capacity. The legislature by general law may provide eligibility limitations under this section and may impose sanctions in furtherance of the taxation policy of this section. (b) If a property owner qualifies his land for designation for agricultural use under Section 1-d of this article, the land is subject to the provisions of Section 1-d for the year in which the designation is effective and is not subject to a law enacted under this Section 1-d-1 in that year. (Added Nov. 7, 1978; Subsec. (a) amended Nov. 7, 1995.) TEMPORARY PROVISION. (a) The changes to the law made by Chapter 560, Acts of the 72nd Legislature, Regular Session, 1991, are validated. (b) This section does not authorize a property owner to claim a refund of taxes paid unless the tax payment was challenged as provided by law before the effective date of this amendment. (c) This temporary provision expires January 1, 1998. (Added Nov. 7, 1995.)

Texas Tax Code

Sec. 23.55. Change of Use of Land.

(a) If the use of land that has been appraised as provided by this subchapter changes, an additional tax is imposed on the land equal to the difference between the taxes imposed on the

land for each of the five years preceding the year in which the change of use occurs that the land was appraised as provided by this subchapter and the tax that would have been imposed had the land been taxed on the basis of market value in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due.

(b) A tax lien attaches to the land on the date the change of use occurs to secure payment of the additional tax and interest imposed by this section and any penalties incurred. The lien exists in favor of all taxing units for which the additional tax is imposed.

(c) The additional tax imposed by this section does not apply to a year for which the tax has already been imposed.

(d) If the change of use applies to only part of a parcel that has been appraised as provided by this subchapter, the additional tax applies only to that part of the parcel and equals the difference between the taxes imposed on that part of the parcel and the taxes that would have been imposed had that part been taxed on the basis of market value.

(e) A determination that a change in use of the land has occurred is made by the chief appraiser. The chief appraiser shall deliver a notice of the determination to the owner of the land as soon as possible after making the determination and shall include in the notice an explanation of the owner's right to protest the determination. If the owner does not file a timely protest or if the final determination of the protest is that the additional taxes are due, the assessor for each taxing

unit shall prepare and deliver a bill for the additional taxes plus interest as soon as practicable. The taxes and interest are due and become delinquent and incur penalties and interest as provided
by law for ad valorem taxes imposed by the taxing unit if not paid before the next February 1 that is at least 20 days after the date the bill is delivered to the owner of the land.

(f) The sanctions provided by Subsection (a) of this section do not apply if the change of use occurs as a result of a sale for right-of-way or a condemnation.

(g) If the use of the land changes to a use that qualifies under Subchapter E of this chapter, the sanctions provided by Subsection (a) of this section do not apply.

(h) Additional taxes, if any, for a year in which land was designated for agricultural use as provided by Subchapter C of this chapter (or Article VIII, Section 1-d, of the constitution) are determined as provided by that subchapter, and the additional taxes imposed by this section do not apply for that year.

(i) The use of land does not change for purposes of Subsection (a) of this section solely because the owner of the land claims it as part of his residence homestead for purposes of Section 11.13 of this code.

(j) The sanctions provided by Subsection (a) of this section do not apply to land owned by an organization that qualifies as a religious organization under Section 11.20(c) of this code if the organization converts the land to a use for which the land is eligible for an exemption under Section 11.20 of this code within five years.

(j) The sanctions provided by Subsection (a) do not apply to a change in the use of land if:

(1) the land is located in an unincorporated area of a county with a population of less than 100,000;

(2) the land does not exceed five acres;

(3) the land is owned by a not-for-profit cemetery organization;

(4) the cemetery organization dedicates the land for a cemetery purpose;

(5) the cemetery organization has not dedicated more than five acres of land in the county for a cemetery purpose in the five years preceding the date the cemetery organization dedicates the land for a cemetery purpose; and

(6) the land is adjacent to a cemetery that has been in existence for more than 100 years.

(k) In Subsection (j), "cemetery," "cemetery organization," and "cemetery purpose" have the meanings assigned those terms by Section 711.001, Health and Safety Code.

Acts 1979, 66th Leg., p. 2259, ch. 841, Sec. 1, eff. Jan. 1, 1982. Amended by Acts 1981, 67th Leg., 1st C.S., p. 145, ch. 13, Sec. 71, eff. Jan. 1, 1982; Acts 1983, 68th Leg., p. 4147, ch. 652, Sec. 2, eff. June 19, 1983; Acts 1983, 68th Leg., p. 4824, ch. 851, Sec. 12, eff. Aug. 29, 1983; Acts 1989, 71st Leg., ch. 796, Sec. 20, eff. Sept. 1, 1989.

Amended by Acts 1995, 74th Leg., ch. 471, Sec. 2, eff. June 12, 1995; Acts 1995, 74th Leg., ch. 811, Sec. 1, eff. Aug. 28, 1995.

Texas Tax Code

Sec. 33.01. Penalties and Interest.

(a) A delinquent tax incurs a penalty of six percent of the amount of the tax for the first calendar month it is delinquent plus one percent for each additional month or portion of a month the tax remains unpaid prior to July 1 of the year in which it becomes delinquent. However, a tax delinquent on July 1 incurs a total penalty of twelve percent of the amount of the delinquent tax without regard to the number of months the tax has been delinquent.

(b) If a person who exercises the split-payment option provided by Section 31.03 of this code fails to make the second payment before July 1, the second payment is delinquent and incurs a penalty of twelve percent of the amount of unpaid tax.

(c) A delinquent tax accrues interest at a rate of one percent for each month or portion of a month the tax remains unpaid. Interest payable under this section is to compensate the taxing unit for revenue lost because of the delinquency.

Acts 1979, 66th Leg., p. 2290, ch. 841, Sec. 1, eff. Jan. 1, 1982. Amended by Acts 1981, 67th Leg., 1st C.S., p. 168, ch. 13, Sec. 127, eff. Jan. 1, 1982; Acts 1991, 72nd Leg., ch. 836, Sec. 5.3, eff. Aug. 26, 1991.

Texas Tax Code

Sec. 41.41. Right of Protest.

A property owner is entitled to protest before the appraisal review board the following actions:

(1) determination of the appraised value of the owner's property or, in the case of land appraised as provided by Subchapter C, D, or E, Chapter 23, determination of its appraised or market value;

(2) unequal appraisal of the owner's property;

(3) inclusion of the owner's property on the appraisal records;

(4) denial to the property owner in whole or in part of a partial exemption;

(5) determination that the owner's land does not qualify for appraisal as provided by Subchapter C, D, or E, Chapter 23;

(6) identification of the taxing units in which the owner's property is taxable in the case of the appraisal district's appraisal roll;

(7) determination that the property owner is the owner of property;

(8) a determination that a change in use of land appraised under Subchapter C, D, or E, Chapter 23, has occurred; or

(9) any other action of the chief appraiser, appraisal district, or appraisal review board that applies to and adversely affects the property owner.

Acts 1979, 66th Leg., p. 2305, ch. 841, Sec. 1, eff. Jan. 1, 1982. Amended by Acts 1981, 67th Leg., 1st C.S., p. 170, ch. 13, Sec. 137, eff. Jan. 1, 1982; Acts 1985, 69th Leg., ch. 823, Sec. 3, eff. Jan. 1, 1986; Acts 1989, 71st Leg., ch. 796, Sec. 34, eff. Sept. 1, 1989.

Texas Tax Code

Sec. 42.09. Remedies Exclusive.

(a) Except as provided by Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds:

(1) in defense to a suit to enforce collection of delinquent taxes; or

(2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.

(b) A person against whom a suit to collect a delinquent property tax is filed may plead as an affirmative defense:

(1) if the suit is to enforce personal liability for the tax, that the defendant did not own the property on which the tax was imposed on January 1 of the year for which the tax was imposed; or

(2) if the suit is to foreclose a lien securing the payment of a tax on real property, that the property was not located within the boundaries of the taxing unit seeking to foreclose the lien on January 1 of the year for which the tax was imposed.

(c) For purposes of this section, "suit" includes a counterclaim, cross-claim, or other claim filed in the course of a lawsuit.

Acts 1979, 66th Leg., p. 2311, ch. 841, Sec. 1, eff. Jan. 1, 1982. Amended by Acts 1987, 70th Leg., ch. 53, Sec. 1, eff. May 6, 1987.

(2)

FILED
NOV 4 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-396

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF TEXAS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC RESOLUTION FUND
AS RECEIVER OF FIRST SOUTH, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1825(b)(3) and the doctrine of sovereign immunity exempt the Federal Deposit Insurance Corporation from tax sanctions imposed under state law and from the exhaustion of state administrative requirements for challenging such sanctions.

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OPINIONS BELOW

The order of the Texas Supreme Court denying the petitions for review (Pet. App. 1-2) is unreported. The memorandum opinion of the Texas Court of Appeals (Pet. App. 3-5) and the order of the District Court of Tarrant County, Texas (Pet. App. 6-7) are also unreported.

JURISDICTION

The Texas Supreme Court entered its order on June 5, 1998. The petition for a writ of certiorari was filed on September 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, Congress waived the Federal Deposit Insurance Corporation's (FDIC) immunity from ad valorem taxes "to the same extent, according to its value as other real property is taxed." 12 U.S.C. 1825(b)(1). In so doing, Congress expressly reserved the FDIC's immunity from tax penalties or sanctions:

> The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

12 U.S.C. 1825(b)(3). Section 1819, 12 U.S.C., separately provides that the FDIC may be sued in state court.

2. In February 1990, in its capacity as manager of the Federal Savings and Loan Insurance Corporation's Resolution Fund, as receiver for First South Savings, the FDIC came into possession of three pieces of real property in Tarrant County, Texas. Pet. 1. At the time the FDIC acquired the land, the Tarrant County Appraisal District categorized the property as "qualified open-space" or "agricultural use" land, which entitled it to be appraised for state tax purposes on the basis of its production value. Pet. 1-2; see Tex. Tax Code Ann. §§ 23.41, 23.51 (West 1992); see also Tex. Const. art. 8, § 1-d-1. Two years later, the Tarrant County Appraisal District notified the FDIC that the land no longer qualified for appraisal as an agricultural use because it was not being used for agricultural purposes. Pet. 1-2.

Petitioners then sought to impose "rollback taxes" upon the property for tax years 1987 to 1991, pursuant to Section 23.55 of the Texas Tax Code. See also Tex. Const. art. 8, § 1-d-1(a) (amended 1995). Section 23.55(a) provides that, when land that has been specially appraised pursuant to Section 23.41 of the Texas Tax Code is withdrawn from agricultural use, the owner becomes liable for an additional assessment that is equal to the difference between the taxes actually imposed on the land for each of the preceding five years and the taxes that would have been imposed had the land been taxed on a market-value basis, rather than at its production value, during those years. Section 23.55 refers to that charge as a "sanction." Tex. Tax Code Ann. § 23.55(f), (g), and (j) (West 1992 & Supp. 1998).

3. Petitioners filed suit against the FDIC in state court to recover the rollback taxes, penalties, and interest. The trial court initially ruled in favor of petitioners, but then granted the FDIC's motion for a new trial. Pet. 2. The trial court subsequently granted summary judgment for the FDIC on the ground that the rollback taxes "are a penalty and that the FDIC is not liable for the payment of such taxes, or any interest thereon," citing 12 U.S.C. 1825(b)(3). Pet. App. 7.

The Texas Court of Appeals affirmed. Pet. App. 3-5. The court held that "[t]he FDIC is immune from liability for 'rollback taxes' under the doctrine of sovereign immunity because the taxes are penalties and there is no express congressional waiver of immunity for such a penalty." *Id.* at 4. The court also rejected petitioners' argument that the FDIC should have exhausted its state administrative remedies for challenging the tax assessment, holding that sovereign immunity may be raised at any time. *Ibid.*

The Texas Supreme Court declined to review the court of appeals' judgment. Pet. App. 1-2.

ARGUMENT

The question presented for review turns upon the construction and application of state, not federal, law. Because both state courts agreed in their interpretation of Texas law and because the court of appeals' ruling does not conflict with any ruling of this Court or of any other court, this Court's review is not warranted.

1. Section 1825(b)(3), 12 U.S.C., preserves the FDIC's immunity from the payment of "any amounts in the nature of penalties or fines" imposed by state tax authorities. Petitioners contend (Pet. 3-5) that the state courts erred in holding that the rollback taxes authorized by Texas law are "in the nature of penalties or fines" and thus fall within Section 1825(b)(3)'s prohibition. That claim does not merit further review.

First, while the meaning of Section 1825(b)(3) is ultimately a question of federal law, see *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 565 (1921), the lower courts' analyses of and petitioners' arguments about the character of rollback taxes turn entirely upon state law. See Pet. App. 4, 7; Pet. 4-5 (citing Texas statutory provisions, Texas cases, opinions of the Texas Attorney General, and studies by the Texas Legislative Council and House Study Group); see also *Resolution Trust Corp.* v. *Tarrant County Appraisal Dist.*, 926 S.W.2d 797, 803-805 (Tex. Ct. App. 1996) (relying on state law authorities to hold that rollback tax is a penalty). Neither court purported to construe the language of Section 1825(b)(3); they simply applied its literal terms and concluded that the character of the rollback taxes under state law placed the sanctions squarely within Section 1825(b)(3)'s exemption. Accordingly, to grant

petitioners any relief, this Court would have to overrule the state courts' unanimous conclusions—both here (Pet. App. 4, 7) and in *Tarrant County*, 926 S.W.2d at 805—that the state tax at issue is a penalty designed to sanction property owners for ceasing to use their property for agricultural purposes. This Court should not grant a writ of certiorari to second-guess state courts' consistent construction of state tax law. Cf. *Johnson* v. *Fankell*, 117 S. Ct. 1800, 1804 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.").

Second, the court of appeals' decision does not conflict with any ruling of this Court or any other federal or state court, and petitioners do not suggest otherwise. Petitioners' reliance (Pet. 5) on *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), is misplaced. *Kurth Ranch* did not hold that all taxes are sanctions; the dicta petitioners cite referred in such terms only to taxes on illegal conduct. *Id.* at 771.

Third, the court's determination that the rollback taxes fall within Section 1825(b)(3)'s prohibition is correct. To be barred, the exaction need be only "in the nature of" a penalty. The Texas statute that authorizes the rollback tax repeatedly refers to the assessment as a "sanction." Tex. Tax Code Ann. § 23.55 (f), (g), and (j) (West 1992 & Supp. 1998). The Texas Constitution and the Texas Attorney General also adopt that characterization. Tex. Const. art. 8, § 1-d-1(a) (amended 1995); Op. Tex. Att'y Gen. No. DM-448 (1997) (rollback tax is a "penalty" for taking property out of agricultural production); see also State Property Tax Board, *Manual for the Appraisal of Agricultural Land* 2, 31 (1990) (repeatedly describing the tax as a "penalty").

The court of appeals' construction of Section 1825(b)(3), moreover, comports with the rule that waivers of sovereign immunity must be "strictly construed in favor of the United States." *E.g.*, *United States* v. *Idaho ex rel. Director, Idaho Dep't of Water Resources*, 508 U.S. 1, 7 (1993) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991)). Absent a waiver, governmental instrumentalities are immune from all forms of penalties. *Ault*, 256 U.S. at 563-565.

2. Petitioners argue (Pet. 6-7) that, even if the rollback tax is a penalty, it does not fall within Section 1825(b)(3). That claim is without merit. Section 1825(b)(3)'s plain language embraces all assessments "in the nature of" penalties or fines. Petitioners' effort to rewrite the statute to apply only to late fees (Pet. 6-7) finds no home in the statutory language. And petitioners' reliance on *ejusdem generis* overlooks that the list of examples in Section 1825(b)(3) is prefaced by the word "including," which expands, rather than contracts, the Section's scope. In addition to lacking any basis in the statutory text or common understanding of the term "including," petitioners' argument identifies no conflict with the ruling of another court that would warrant this Court's review.

Petitioners' claim (Pet. 7-8) that the FDIC remains liable for the interest that accrued on the penalties, even if it was under no legal obligation to pay the penalties, is devoid of merit and was properly rejected by both Texas courts. Pet. App. 4, 7.

3. Lastly, petitioners contend (Pet. 8-9) that the FDIC was barred from raising Section 1825(b)(3) as a defense to petitioners' suit because the FDIC failed to exhaust state administrative remedies for challenging the imposition of the tax penalty. The state court resolved this question of Texas administrative pro-

cedure against petitioners (Pet. App. 4), and the state court's interpretation of the scope and operation of its own administrative procedures presents no substantial federal question for this Court to review. See *Johnson*, 117 S. Ct. at 1804. In any event, sovereign immunity cannot be waived by the acts of individual governmental officials. *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513-514 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998